(1) Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

TOMMIE HASS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTION PRESENTED

Whether the District Court should conduct a *de novo* sentencing hearing, after the case has been remanded for resentencing, when not restricted by the remand order.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is recorded at *United States v. Hass*, 199 F.3d 749 (5th Cir. 1998). (App. A). The *per curium* opinion denying the petition for rehearing was filed on 24 January 2000. (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit ("Court of Appeals") was entered on 29 December 1999. (App. A). The Court of Appeals denied a timely filed Petition for Rehearing on 24 January 2000. (App. C).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2106 provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

In turn, Rule 32(c)(1), Fed. R. Crim. P. reads, as follows:

> Sentencing Hearing. At the sentencing hearing, the court must afford counsel for the defendant and for the Government an opportunity to comment on the probation officer's determinations and on other matters relating to the appropriate sentence, and must rule on any unresolved objection to the presentence report. The court may, in its discretion, permit the parties to introduce testimony or other evidence on the objections. For each matter controverted, the court must make either a finding on the allegation or a determination that no finding is necessary because the controverted matter will not be taken into account in, or will not affect, sentencing. A written record of these findings and determinations must be appended to any copy of the presentence report made available to the Bureau of Prisons.

STATEMENT OF THE CASE

The Courts of Appeal are split on the issue of whether a resentencing hearing on remand should be conducted *de novo*. A majority of the Circuits hold that a resentencing hearing should be conducted *de novo* while the minority view limits the scope of the resentencing to the issues relevant to the decision of the Court of Appeals. This case presents an opportunity for the Court to resolve the conflict in the Circuits.

A. Proceedings Below

The Petitioner Tommie Hass ("Hass") was charged with the offense of conspiracy to manufacture and distribute methamphetamine. *See* 21 U.S.C. § 846. [The United States District Court for the Eastern District of Texas, Tyler Division, had jurisdiction pursuant to 18 U.S.C. § 3231.] The Government offered evidence and testimony that Hass and other alleged co-conspirators acquired and distributed large amounts of methamphetamine. (R.VIII-237) On 27 February 1997, the jury found Hass guilty of the offense of conspiracy as alleged in the indictment.

The first sentencing hearing was conducted on 7 July 1997. The Government filed a "Notice of Sentence Enhancement" pursuant to 21 U.S.C. § 841(b). Both the Government and Hass objected at the original sentencing hearing to the calculation of the drug quantity involved in the conspiracy. The district court overruled those objections and held that the base offense level and the total offense level was 36. However, the district court did not assess punishment under the Sentencing Guidelines based on the drug quantity that was involved. Instead, because Hass had been convicted of two or more prior felony drug offenses, the punishment was enhanced to a mandatory term of life imprisonment pursuant to 21 U.S.C. § 841(b)(1)(A) ("three strikes provision"). *See also* § 5G1.1. Federal Sentencing Guidelines Thus, the calculation of the drug quantity played no role in the assessment of punishment. The trial court subsequently sentenced Hass to life confinement pursuant to the "three strikes provision".

The conviction was appealed and, on 5 August 1998, the Court of Appeals reversed the case because the sentence

had been improperly enhanced under 21 U.S.C. § 841. *See United States v. Hass*, 150 F.3d 443 (5th Cir. 1998). Hass did not challenge the drug quantities during this initial appeal because that matter was not at issue. The case was remanded to the trial court for re-sentencing.

The re-sentencing hearing was conducted on 28 October 1998. During the resentencing hearing, Hass reurged his objections to the calculation of the drug quantity but the district court refused to reconsider such calculation. Instead, the district court adopted the factual findings in the pre-sentence report and the offense level was again set at 36. Hass was then sentenced within that guideline imprisonment range for a period of two hundred forty (240) months to be followed by a five (5) year term of supervised release. (App. B). The sentence was again appealed.

In the Court of Appeals, Hass now raised the issue regarding the trial court's calculation of the drug quantity attributed to him. The Government responded by contending that such challenge to the drug quantity was not cognizable because the issue had not been raised in the initial appeal. In response, Hass stated that he had no reason to raise the drug quantity issue in the initial appeal because he was not sentenced pursuant to the calculation of such drug quantity under § 2D.1.1. Federal Sentencing Guidelines. Hass further stated that only after resentencing was that issue ripe for appellate review.

However, the Court of Appeals refused to address the drug quantity issue and held:

> . . . all issues not arising out of the remand order which could have been brought in the original

> appeal are not proper for reconsideration by the district court below at resentencing.

Hass, 199 F.3d at 753. In affirming the sentencing, however, the Court of Appeals acknowledged that there was a "significant circuit split" regarding the scope of the resentencing on remand. [*See Hass* at 199 F.3d at 752, n.2].

REASON FOR GRANTING THE WRIT

THIS PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ENTERED A DECISION IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME IMPORTANT MATTER, NAMELY WHETHER THE SENTENCING COURT ON REMAND SHOULD CONDUCT A *DE NOVO* HEARING WHEN NOT RESTRICTED BY THE REMAND ORDER.

On direct appeal, the Courts of Appeal have statutory power under 28 U.S.C. § 2106 to "vacate" a sentence and to "remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106. In remanding the case to the district court, the Court of Appeals simply ordered:

> . . . we VACATE the district court's imposition of a life sentence for Tommie Hass, and REMAND for his resentencing.

Hass, 150 F.3d at 451. The foregoing remand order was silent as to whether the district court could conduct a *de novo* sentencing.

Only after Hass was resentenced under the Federal Sentencing Guidelines did he have reason and incentive to appeal the drug quantity calculations. Nevertheless, in refusing to address the drug quantity issue that was raised by Hass during the second appeal of this case, the Court of Appeals stated:

> We find that our holding in *Marmolejo II* is controlling, and that the district court properly precluded Hass from raising the drug quantity issue on remand.

Hass, 199 F.3d at 753. In *United States v. Marmolejo*, 139 F.3d 528 (5th Cir. 1998) [referred to as *Marmolejo II*] the Court of Appeals had earlier stated:

> The only issues on remand properly before the district court are those issues arising out of the correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs- no more, no less. All other issues not arising out of the court's ruling and not raised before the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court below.

Id. 531. However, the Court of Appeals recognized that its holding regarding this limitation on the resentencing hearing was not followed by a majority of the Circuits. The Court of Appeals acknowledged such fact, as follows:

> As the Court of Appeals recognized in *Marmelejo II*, the scope of a remand for resentencing has

> caused a significant circuit split. Under the majority view, sentencing following remand should be conducted *de novo*, and thus a district judge is not limited to reviewing only those issues related to the remand order. See *Marmolejo II*, 139 F.3d at 530 (citing *United States v. Smith*, 116 F.3d 857 (10th Cir. 1997); *United States v. Jennings*, 83 F.3d 145 (6th Cir. 1996); *United States v. Atechoriva*, 69 F.3d 679 (6th Cir. 1996 [sic 2nd Cir. 1996]); *United States v. Ponce*, 51 F.3d 820 (9th Cir. 1995); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992). By contrast, under the minority view, "only those discrete, particular issues identified by the appeals court of remand are properly before the resentencing court," i.e., a waiver approach. *See Id.* (citing *United States v. Whren*, 111 F.3d 956 (D.C.Cir. 1997), *United States v. Parker*, 101 F.3d 527 (7th Cir. 1996).

Hass, 199 F.3d 752, n.2. In addition to the foregoing, it appears that the Fourth Circuit has adopted the limited sentencing approach. *See United States v. Brown*, 202 F.3d 691, 703-704 (4th Cir. 2000). Also, in *United States v. Ticchiarelli*, 171 F.3d 24 (1st Cir. 1999), the First Circuit reviewed the conflict between the Circuits and adopted the reasoning set forth in *United States v. Whren*, 111 F.3d 956 (D.C. Cir. 1997) where that court held:

> A defendant should not be held to have waived an issue if he did not have reason to raise it at his original sentencing; but neither should a defendant be able to raise an issue for the first time upon resentencing if he did have reason but failed

> nonetheless to raise it in the earlier proceeding. Under our approach a defendant may argue at resentencing that the court of appeals' decision has breathed life into a previously dormant issue, but he may not revive in the second round an issue he allowed to die in the first.

Id. 960.

Hass would urge that this case presents the Court with an opportunity to resolve the foregoing conflict between the Circuits. Hass would further urge that this Court should rule that sentencing following remand should be conducted *de novo* and not simply limited to reviewing only those issues related to the decision of the Court of Appeals. The majority view is perhaps best expressed in *United States v. Jennings*, 83 F.3d 145 (6th Cir. 1996) where the court stated:

> On remand, the only constraint under which the District Court must operate, for the purposes of resentencing, is the remand order itself. Where the remand does not limit the District Court's review, sentencing is to be *de novo*. The District Court erred in refusing to consider [the defendant's] objections to the relevant conduct section of his supplemental presentence report.

Id. 151. [Emphasis in original].

The *Jennings* court then set forth the rationale for the *de novo* rule as follows:

> Such a rule is particularly compelling given the facts of this case. At the original sentencing, the

> relevant conduct was *irrelevant* to the determination of defendant's base offense level. Were we to establish a rule precluding subsequent inquiry upon remand into such findings, then defendants would be forced to litigate every aspect of the sentencing report in the original hearing, even though irrelevant to the immediate sentencing determination in anticipation of the possibility that, upon remand, the issue might be relevant. Such "front-loading" would unnecessarily increase the burden on district courts and this court. In the interest of judicial economy it will not be required.

Id. 151. [Emphasis in original]. The present case illustrates why the *de novo* rule should be adopted and followed by all the Circuits. As previously stated, *Hass* did not raise the drug quantity issue during the initial appeal because he was sentenced under the "three strikes provision". Therefore, the drug quantity amount was not an issue because he was not sentenced under the Guidelines. Only after the sentencing was vacated and the case was remanded to the trial court did the drug quantity amount become at issue. Nevertheless, the Court of Appeals refused to address the drug quantity issue during the second appeal because that issue had not been "front-loaded" during the initial appeal. Clearly, the proper procedure would have been to allow a *de novo* hearing on remand.

Secondly, the argument for a *de novo* resentencing hearing is particularly compelling when considering the fact that sentencing is now conducted pursuant to the Federal Sentencing Guidelines. In *Burns v. United States*, 501 U.S. 135, 111 S. Ct. 2182, 115 L. Ed. 2d 123 (1991), this Court noted:

> The Sentencing Reform Act of 1984 revolutionized the manner in which district courts sentence persons convicted of federal crimes.

Id. 111 S. Ct. at 2184. A remand for resentencing under the Guidelines necessitates a *de novo* hearing due to the interrelationship of the various components of the Guidelines. If the sentence is vacated, the district court must be allowed to conduct a *de novo* hearing in order to determine the proper and just sentence. More specifically, the district court's fact findings under the Sentencing Guidelines are frequently interdependent. Likewise, the need for *de novo* resentencing is also found in those cases involving multiple counts. In *United States v. Atehortva*, 69 F.3d 679 (2nd Cir. 1995), the Second Circuit noted:

> Courts have generally treated resentencing hearings as opportunities for de novo hearings when resentencing occurs as a result of misapplications of the sentencing guidelines. We believe the same principal applies here. When a defendant challenges convictions on particular counts that are inextricably tied to other counts in determining the sentencing range under the guidelines, the defendant assumes the risk of undoing the intricate knot of calculations should he succeed. [citations omitted] Once this knot is untied, the district court must sentence the defendant de novo and, if a more severe sentence results, vindictiveness will not be presumed.

Id. 685-686. Hass would urge that a *de novo* hearing on remand in this case and appellate review of that sentence would have avoided the injustice that resulted in this case.

Furthermore, the adoption of a *de novo* rule would avoid so-called "front-loading" of appellate issues and would operate in the interest of judicial economy.

CONCLUSION

This case presents the Court with the opportunity to resolve the conflict between the Circuits as to whether a resentencing hearing on remand should be conducted *de novo*. The Petitioner Hass respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AND FILED DECEMBER 29, 1999

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 98-41423

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TOMMIE HASS,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas, Tyler Division
No. 6:96-CR-50-7

Before KING, Chief Judge, JONES and STEWART, Circuit Judges.

CARL E. STEWART, Circuit Judge:

The issue before us is whether the district court on remand erred when it precluded the appellant, Tommie Hass ("Hass"), from raising the issue of drug quantity which he failed to raise during his initial appeal. For the reasons set forth below, we affirm the district court's ruling and find that Hass was foreclosed from challenging drug quantity at resentencing.

Appendix A

FACTUAL AND PROCEDURAL HISTORY

Hass was convicted of conspiring to manufacture and distribute methamphetamine in violation of 21 U.S.C. § 846. In the Presentence Investigation Report ("PSR") prepared for Hass' sentencing, the probation officer concluded that Hass and his co-conspirators possessed at least 26.8 kilograms of methamphetamine during the course of this conspiracy. The PSR stated that this amount of methamphetamine attributed to Hass was a "very conservative estimate" of what he actually distributed. Hass filed an extensive memorandum detailing his objections to the PSR which included: 1) the possible imposition of a life sentence, 2) the *calculation of drug quantities* attributed to him, and 3) the assessment of his criminal history. The government filed a response to Hass's objections, including a response to Hass's claim that the drug quantity attributed to Hass had been wrongly calculated.

At sentencing, the district court heard arguments from the government and Hass regarding the PSR's recommendation that Hass be sentenced to a life sentence under 21 U.S.C. § 841(b)(1)(a) ("three strikes provision") because he had committed two prior felonies. The district court also found that Hass' objections to drug quantity, and computation of his criminal history were without merit. Following the arguments by both counsel on application of the three strikes provision, the district court adopted the PSR's findings.

In his initial appeal to this court Hass argued that the life sentence based on the three strikes provision was based on the erroneous finding that he had two *final* felony

convictions. We upheld Hass' conviction in, *United States v. Hass*, 150 F.3d 443 (5th Cir. 1998). However, we vacated the life sentence imposed on him under the three strikes provision. We found that Hass was not eligible for a life sentence under the three strikes provision because his two prior convictions were not final at the time the present violations were committed. *Id.* at 450. This court then remanded the case for resentencing. During his initial appeal to this court Hass did not put forth the issue of the drug quantities attributed to him in the original PSR.

On remand, the case was assigned to a new judge for resentencing. At resentencing Hass argued that the quantity of drugs attributed to him in the PSR was too high. The district court declined to address this drug quantity argument. The district court concluded that the only issue on remand from this court was to resentence Hass without application of the three strikes provision. Thus, the district court adopted the findings on drug quantity from the original PSR, and enhanced Hass' sentence based on these findings. Hass was sentenced to 240 months imprisonment and 5 years supervised release.

DISCUSSION

Generally, review of a sentence is confined to determining whether a sentence was imposed in violation of law, as a result of the incorrect application of the Sentencing Guidelines. *See United States v. Ashburn*, 38 F.3d 803, 807 (5th Cir. 1994). However, the issue before us is not whether the district court applied the guidelines correctly, but whether the district court erred when it denied Hass an evidentiary

hearing on drug quantity. We review the denial of an evidentiary hearing for abuse of discretion. *United States v. Henderson*, 19 F.3d 917, 927 (5th Cir.), cert. denied, __ U.S. __, 115 S.Ct. 207, 130 L.Ed.2d 137 (1994).

Hass argues that the district court erred when it failed to hear his claim regarding the quantity of drugs attributable to him for sentencing purposes. Specifically, he argues that because his first appeal was from the district court's imposition of a life sentence based on the three strikes provision the issue regarding drug quantity was irrelevant, and he had no incentive to raise it. According to Hass, the issue of drug quantity only became relevant after we found that the district court had erroneously sentenced him under the three strikes provision, and remanded for resentencing. The government counters that the district court correctly precluded Hass from raising the drug quantity issue on remand because Hass had an opportunity to raise the issue in his initial appeal, but declined to do so. Thus, the government asserts that Hass was confined to raising only those issues which arose from the scope of our previous remand order. After a careful review of the record and our circuit's precedent, we agree with the government's position.

The present case is subject to this court's ruling in *United States v. Marmolejo*, 139 F.3d 528 (5th Cir. 1998) ("Marmolejo II"). In that case, Marmolejo was found guilty of possession with intent to distribute cocaine and marihuana, conspiracy to launder monetary instruments, and accepting bribes as a public official. *See Marmolejo II*, 139 F.3d at 529. The PSR recommended a base offense level of 38, and base level enhancements for: 1) use of a firearm during the

transport of drugs, 2) abuse of his position of public trust as an Immigration and Naturalization services agent, and 3) obstruction of justice. *See Id.* Marmolejo objected to the enhancements based on possession of a firearm and obstruction of justice. *Id.* The district court declined to enhance Marmolejo's sentence for possession of a firearm, and reduced his sentence for acceptance of responsibility and minor participation. *Id.* However, the district court did enhance the sentence for obstruction of justice and abuse of position. *Id.*

Both the government and Marmolejo appealed the district court's judgment. Marmolejo only challenged the sufficiency of the evidence for his convictions. *Id.* The government appealed the district court's failure to enhance Marmolejo's sentence for possession of a firearm, and the reduction of Marmolejo's sentence for acceptance of responsibility and minor participation. *Id.* Marmolejo did not raise on appeal the issue of the district court's sentence enhancement for obstruction of justice. This court upheld Marmolejo's conviction. However, we found in favor of the government's position that the district court had erred by not imposing a sentence enhancement for possession of a firearm. *See United States v. Marmolejo*, 106 F.3d 1213 (5th Cir. 1997). We vacated Marmolejo's sentence and remanded it to district court for resentencing consistent with our opinion.

At resentencing, Marmolejo sought to introduce evidence on the obstruction of justice issue. The district court declined to hear the evidence because the district court's

original finding on that issue had not been raised on appeal.[1] *Marmolejo II*, 139 F.3d at 530. Marmolejo appealed the district court's refusal to hear the obstruction of justice evidence. He argued that a resentencing hearing should be conducted de novo to hear new evidence on all sentencing issues. *Id.* We expressly rejected this argument and held that the district court properly refused to hear new evidence at resentencing because the scope of this court's remand order was limited.[2] Clarifying the scope of this court's remand order we stated:

> The only issues on remand properly before the district court are those which arise out of the

---

1. Marmolejo also sought to introduce evidence on acceptance of responsibility, which the district judge declined to hear. The court found that additional evidence on the issue would not change the matter, since statements made by Marmolejo at sentencing as well as existing evidence was enough to find that acceptance of responsibility was not appropriate. *See Marmolejo II*, 139 F.3d at 529-530.

2. As we recognized in *Marmolejo II*, the scope of a remand for resentencing has caused a significant circuit split. Under the majority view, sentencing following remand should be conducted de novo, and thus a district judge is not limited to reviewing only those issues related to the remand order. *See Marmolejo II*, 139 F.3d at 530. (citing *United States v. Smith*, 116 F.3d 857 (10th Cir. 1997); *United States v. Jennings*, 83 F.3d 145 (6th Cir. 1996); *United States v. Atechoriva*, 69 F.3d 679 (6th Cir. 1996); *United States v. Ponce*, 51 F.3d 820 (9th Cir. 1995); *United States v. Cornelius*, 968 F.2d 703 (8th Cir. 1992)). By contrast, under the minority view, "only those discrete, particular issues identified by the appeals court remand are properly before the resentencing court," i.e., a waiver approach. *See id.* (citing *United States v. Whren*, 111 F.3d 956 (D.C. Cir. 1997), *United States v. Parker*, 101 F.3d 527 (7th Cir. 1996).

> correction of the sentence ordered by this court. In short, the resentencing court can consider whatever this court directs — no more, no less. All other issues not arising out of this court's ruling and not raised in the appeals court, which could have been brought in the original appeal, are not proper for reconsideration by the district court below.
>
> *Marmolejo II*, 139 F.3d at 531.

The facts of the present case are strikingly similar to those in *Marmolejo II*. In his original objections to the PSR, Hass specifically objected to the drug quantities attributable to him. At the original sentencing the district court stated that it had considered Hass's objection to the drug quantities and found these arguments to be without merit, and refused to reduce Hass's base offense level. Hass was obviously aware of this adverse ruling, yet did not challenge the district court's drug quantity finding during his initial appeal. As a result, although the drug quantity issue was fully presented and reviewed by the district court this court's decision only considered Hass's arguments on the three strikes provision. Our remand order only directed the district court to resentence Hass without applying the three strikes provision. Therefore, the district court on remand properly followed our *Marmolejo II* instructions to only address "issues arising out of the correction of the sentence ordered by [the appellate] court." *Marmolejo II*, 139 F.3d at 531.

Hass specifically contends that he did not have an incentive to raise the drug quantity issue in his initial appeal

because the application of the three strikes provision made drug quantity irrelevant. Hass's argument is similar to an argument raised by the defendant in *United States v. Ticchiarelli*, 171 F.3d 24, 30 (1st Cir. 1999). In *Ticchiarelli*, the defendant claimed that he did not challenge drug quantity at his original sentencing because even if the drug quantity had been reduced it would not have affected the length of his sentence. The defendants original sentence was vacated and remanded to the district court for resentencing. Therefore, at resentencing the defendant sought to introduce evidence of drug quantity. The First Circuit concluded that whether a defendant waived an issue for consideration at resentencing is determined by whether the defendant had an incentive to raise that issue in the prior proceedings. *Id.* at 33.

However, the record in the present case is different from the circumstances in *Ticchiarelli*. In the present case, Hass raised the issue of drug quantity during his original sentencing. Hass simply failed to pursue this issue on appeal. Therefore, Hass cannot claim that he felt the drug quantity issue was irrelevant because he submitted objections to these findings at the district court level. A defendant cannot know which appellate argument might be successful, therefore each contested issue must be appealed. Countless criminal appeals are determined by our court which encompass multiple bases of relief claimed by appellants. Hass's circumstance is no different. Because Hass had another appealable issue which turned out to be successful, does not mean that the issue of drug quantity was not germane and appealable. Therefore, we reiterate our conclusion from *Marmolejo II* that all issues not arising out of the remand order which could have been brought in the original appeal are not proper for

reconsideration by the district court below at resentencing. *Marmolejo II*, 139 F.3d at 531.

CONCLUSION

We find that our holding in *Marmolejo II* is controlling, and that the district court properly precluded Hass from raising the drug quantity issue on remand. Accordingly, we AFFIRM the district court's ruling.

AFFIRMED.

APPENDIX B — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS DATED AND FILED OCTOBER 28, 1998

United States District Court
Eastern District of Texas

Case Number: 6:96CR00050-007

UNITED STATES OF AMERICA

v.

TOMMIE HASS

AMENDED JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

John Hagler, Esquire
Defendant's Attorney

Date of Original Judgment: 07/03/1997
(or Date of Last Amended Judgment)

Reason for Amendment:

☒ Correction of Sentence on Remand (Fed. R. Crim. P. 35(a))

* * *

Appendix B

THE DEFENDANT:

* * *

☒ was found guilty on count(s) 1 of SS Indictment after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Conspiracy to Manufacture and Distribute Methamphetamine	09/11/1996	1

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

* * *

☒ Count(s) in Indictment are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Appendix B

Defendant's Soc. Sec. No.: 324-09-9445	10/28/1998 Date of Imposition of Judgment
Defendant's Date of Birth: 10/20/1955	
Defendant's USM No.: 06224-078	s/ John Hannah, Jr. Signature of Judicial Officer
Defendant's Residence Address: P. O. Box 271 Alba TX 75410	John Hannah, Jr. United States District Judge Name & Title of Judicial Officer
Defendant's Mailing Address: P. O. Box 271 Alba TX 75410	29 October 98 Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 240 month(s).

The sentence shall run concurrently with defendant's undischarged terms of imprisonment of six years in Case Nos. 14.566-95 by the 294th Judicial District Court, Wood County, Texas and F-9600739-R by the 265th Judicial District Court, Dallas, Texas.

* * *

Appendix B

☒ The defendant is remanded to the custody of the United States Marshal.

* * *

RETURN

* * *

Defendant delivered on 11/9/98 to FDC SEAGOVILLE, TX at 11:30 AM, with a certified copy of this judgment.

Norris Batiste, Jr.
UNITED STATES MARSHAL

By s/ [illegible]
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s).

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

Appendix B

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

* * *

☒ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall

permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in a program of testing and treatment for drug abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Appendix B

Assessment

Totals:	$ 100.00

* * *

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately;

* * *

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

All criminal monetary penalty payments are to be made to the Fine and Restitution Section, US Courts, P.O. Box 570, Tyler, TX 75710, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

* * *

Appendix B

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

ADDITIONAL FINDINGS AND GUIDELINE APPLICATIONS EXCEPTIONS

The court finds that the convictions listed in paragraphs 50, 54, and 55 of the presentence report are time barred. Based on that determination, the court finds that the criminal history points would be 6 resulting in category III. Offense level 36 and criminal history category III result in a guideline imprisonment range of 235-293 months.

Appendix B

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: III

Imprisonment Range: 235 to 293 months

Supervised Release Range: 5 years

Fine Range: $ 20,000.00 to $ 8,000,000.00

☒ Fine waived or below the guideline range because of inability to pay.

* * *

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the sentence is imposed for the following reason(s):

The court finds that defendant's criminal history shows little evidence of violence. The court further finds that the defendant was less culpable than some of the other members of the conspiracy. Taking these findings into consideration, and noting that the defendant is now 43 years old, the court sentences the defendant to the lower end of the guidelines.

* * * *

APPENDIX C — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED JANUARY 24, 2000

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-41423

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

TOMMIE HASS

Defendant-Appellant

Appeal from the United States District Court for the Eastern District of Texas, Tyler

ON PETITION FOR REHEARING

Before KING, Chief Judge, JONES and STEWART, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED

ENTERED FOR THE COURT:

s/ Carl E. Stewart
United States Circuit Judge

Supreme Court, U.S.
FILED
JUN 20 2000
CLERK

(2)

No. 99-1694

In the Supreme Court of the United States

TOMMIE HASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
Solicitor General
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16 pp

QUESTION PRESENTED

Whether the district court erred at resentencing by declining to reconsider the drug quantity finding it had made at petitioner's first sentencing.

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In the Supreme Court of the United States

No. 99-1694

TOMMIE HASS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 199 F.3d 749. An earlier opinion of the court of appeals is reported at 150 F.3d 443.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1999. A petition for rehearing was denied on January 24, 2000 (Pet. App. 20a). The petition for a writ of certiorari was filed on April 20, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Texas, petitioner was convicted of conspiring to manufacture and distribute methamphetamine, in violation of 21 U.S.C. 846. He was sentenced to life imprisonment under the "three strikes" provision of 21 U.S.C. 841(b)(1)(A). The court of appeals affirmed petitioner's conviction, but remanded for resentencing because the government had failed to prove that petitioner had two final felony drug convictions at the time of the commission of the instant methamphetamine conspiracy offense. 150 F.3d 450-451. On remand, petitioner was sentenced to 240 months' imprisonment, to be followed by a five-year period of supervised release. The court of appeals affirmed. Pet. App. 1a-9a.

1. From 1993 to 1996, petitioner was involved in a large-scale methamphetamine manufacturing and distribution ring known as the Anderson Organization. The organization purchased and manufactured methamphetamine in various locations in the Dallas, Texas, area, and distributed it throughout the United States. Petitioner and his brother Richard were one of the organization's major sources of methamphetamine. 150 F.3d at 445-446.

2. Petitioner was tried and found guilty of conspiring to manufacture and distribute methamphetamine. In the Presentence Investigation Report (PSR) prepared for petitioner's sentencing, the probation officer concluded that petitioner and his co-conspirators possessed at least 26.8 kilograms of methamphetamine during the course of the conspiracy, and that this amount was a "very conservative estimate" of the total amount that petitioner distributed. Pet. App. 2a; PSR ¶ 38.

The PSR recited that the base offense level was 36 for that amount of methamphetamine, which, combined with petitioner's criminal history category of VI, produced a sentencing range of 324-405 months' imprisonment. PSR ¶¶ 39, 95. The PSR noted, however, that petitioner had three prior felony drug convictions (PSR ¶¶ 57, 59-60), and recited that petitioner was thus subject to a mandatory term of life imprisonment pursuant to 21 U.S.C. 841(b)(1)(A) and Sentencing Guidelines § 5G1.1(b). PSR ¶¶ 94-95.

Petitioner filed an extensive memorandum detailing his objections to the PSR, which included a challenge to the possible imposition of a life sentence; the calculation of drug quantities attributed to him; and the assessment of his criminal history. The government filed a response to petitioner's objections, including a response to petitioner's claim that the drug quantity attributed to petitioner had been wrongly calculated. Pet. App. 2a.

At sentencing, the district court determined that petitioner's objections to the calculation of drug quantities attributable to him and to the computation of his criminal history were without merit. The court thus refused to reduce petitioner's base offense level. The court also heard argument from the government and petitioner regarding the PSR's recommendation that petitioner be sentenced to life imprisonment under 21 U.S.C. 841(b)(1)(A), because he had committed two prior felonies. The court adopted the PSR's findings and sentenced petitioner to life imprisonment. Pet. App. 2a.

3. In petitioner's original appeal, he raised several challenges to his conviction and also argued that his life sentence based on the three strikes provision was based on an erroneous finding that he had two felony con-

victions that had become final before he committed the instant offense. Petitioner did not challenge the district court's drug quantity findings. The court upheld petitioner's conviction, but vacated the life sentence. The court found that petitioner was not eligible for a life sentence under the three strikes provision of 21 U.S.C. 841(b)(1)(A), because his two prior convictions were not final at the time the present conspiracy violation was committed. 150 F.3d at 449-450. The court remanded for resentencing, stating: "[B]ecause the Government failed to establish that [petitioner] had two final felony drug convictions at the time of the commission of the instant offense, we VACATE the district court's imposition of a life sentence for [petitioner], and REMAND for his resentencing." 150 F.3d at 451.

On remand, petitioner argued that the quantity of drugs attributed to him in the PSR was too high. The district court declined to address the drug quantity argument, concluding that the only course open to the court on remand from the court of appeals was to reimpose sentence without application of the three strikes provision. The district court adopted the findings on drug quantity from the original PSR and enhanced petitioner's sentence based on those findings. The court sentenced petitioner to 240 months' imprisonment, to be followed by a five-year period of supervised release. Pet. App. 3a.

4. Petitioner appealed his sentence, arguing that the district court erred on remand in precluding him from raising the issue of drug quantity. The court of appeals affirmed petitioner's sentence. Relying on *United States* v. *Marmolejo*, 139 F.3d 528 (5th Cir.), cert. denied, 525 U.S. 1056 (1998), the court held that petitioner was foreclosed from challenging drug quantity at resentencing because he failed to raise the issue during

his initial appeal. Pet. App. 7a-9a. The court noted that petitioner had obviously been aware of the district court's adverse ruling rejecting his objections to the PSR's drug quantity findings, yet had failed to challenge those findings during his initial appeal. "As a result, although the drug quantity issue was fully presented and reviewed by the district court this court's decision only considered [petitioner's] arguments on the three strikes provision." Pet. App. 7a. The court found that its remand order "only directed the district court to resentence [petitioner] without applying the three strikes provision," and that the district court on remand had properly followed the court's instructions "to only address 'issues arising out of the correction of the sentence ordered by [the appellate] court.'" *Ibid.* (quoting *United States* v. *Marmolejo*, 139 F.3d at 531).

The court rejected petitioner's contention that he had no incentive to raise the drug quantity issue in his initial appeal because the district court's application of the three strikes provision made drug quantity irrelevant. The court found that petitioner could not claim that he believed that the drug quantity issue was irrelevant, because he had objected to the drug quantity findings at the district court level. The court explained:

> A defendant cannot know which appellate argument might be successful, therefore each contested issue must be appealed. Countless criminal appeals are determined by our court which encompass multiple bases of relief claimed by appellants. [Petitioner's] circumstance is no different. Because [petitioner] had another appealable issue which turned out to be successful, does not mean that the issue of drug quantity was not germane and appealable. There-

> fore, we reiterate our conclusion from [*United States* v. *Marmolejo*] that all issues not arising out of the remand order which could have been brought in the original appeal are not proper for reconsideration by the district court below at resentencing.

Pet. App. 8a-9a.

ARGUMENT

Petitioner contends (Pet. 5-11) that the district court should have conducted a *de novo* sentencing hearing on remand from the court of appeals' first decision, at which he should have been allowed to raise the issue of drug quantity. Petitioner further contends that the decision of the court of appeals conflicts with decisions from other courts of appeals. The decision of the court of appeals is correct and does not present a conflict meriting this Court's attention. This Court recently denied review in the case on which the court below relied in rejecting petitioner's claim, see *Marmolejo* v. *United States*, 525 U.S. 1056 (1998) (No. 98-5372), and there is no reason for a different result here.

1. It is settled that, after a court of appeals has reversed the judgment in a criminal case, it has authority to provide either for *de novo* resentencing or for more limited resentencing. See, *e.g.*, *United States* v. *Moore*, 131 F.3d 595, 598 (6th Cir. 1997); *United States* v. *Santonelli*, 128 F.3d 1233, 1238-1239 (8th Cir. 1997) ("Ordinarily, an appeals court can avoid the problem of multiple appeals by specifically issuing limited remands [in] sentencing cases, leaving open for resolution only the issue found to be in error on the initial sentencing. Of course in an appropriate case it may remand for a complete redetermination of the sentence."); *United States* v. *Webb*, 98 F.3d 585, 587 (10th Cir. 1996), cert. denied, 519 U.S. 1156 (1997); *United States* v. *Polland*,

56 F.3d 776, 777-778 (7th Cir. 1995) ("[W]e have the power to limit a remand to specific issues or to order complete resentencing."); *United States* v. *Pimentel*, 34 F.3d 799, 800 (9th Cir. 1994), cert. denied, 513 U.S. 1102 (1995); *United States* v. *Bell*, 5 F.3d 64, 66-67 (4th Cir. 1993).

It is also settled that, except perhaps in extraordinary circumstances, a district court conducting a resentencing must act in conformity with the mandate of the court of appeals. See, *e.g.*, *United States* v. *Campbell*, 168 F.3d 263, 265 (6th Cir.), cert. denied, 120 S. Ct. 195 (1999); *Moore*, 131 F.3d at 598; *Webb*, 98 F.3d at 587; *United States* v. *Tamayo*, 80 F.3d 1514, 1519-1520 (11th Cir. 1996); *Polland*, 56 F.3d at 777-778 (citing cases); *Pimentel*, 34 F.3d at 800; *Bell*, 5 F.3d at 66. Thus, the courts of appeals agree that they have discretion to determine the scope of a resentencing, and that the district court is obliged to follow the directions of the court of appeals when conducting the resentencing.

In remanding for resentencing in this case, the court of appeals stated: "[B]ecause the Government failed to establish that [petitioner] had two final felony drug convictions at the time of the commission of the instant offense, we VACATE the district court's imposition of a life sentence for [petitioner], and REMAND for his resentencing." 150 F.3d at 451. The district court interpreted that mandate as limiting the scope of remand, Pet. App. 3a, and the Fifth Circuit confirmed that interpretation by holding that "[o]ur remand order only directed the district court to resentence [petitioner] without applying the three strikes provision," *id.* at 7a. Given that limited remand order, the district court properly concluded that it lacked authority to

reconsider sentencing claims unrelated to those enhancements.

The courts of appeals have consistently held that *de novo* resentencing is inappropriate after limited remand orders. See, *e.g.*, *Santonelli*, 128 F.3d at 1237 (resentencing was properly limited to correction of a single error where, although court of appeals stated generally that case was remanded for resentencing, "that statement must be read with the analysis offered in the opinion," which gave one specific reason for resentencing); *United States* v. *Whren*, 111 F.3d 956, 958-960 (D.C. Cir. 1997), cert. denied, 522 U.S. 1119 (1998); *Tamayo*, 80 F.3d at 1519-1520; *Polland*, 56 F.3d at 777-778 (resentencing was properly limited where case had been remanded "for resentencing on the issue of obstruction of justice"); *United States* v. *Stanley*, 54 F.3d 103, 107-108 (2d Cir.), cert. denied, 516 U.S. 891 (1995); *Pimentel*, 34 F.3d at 800 (resentencing was properly limited where court of appeals had "expressly limited the scope of [the] remand to consideration of a single sentencing issue").

2. Petitioner contends that there is a disagreement among the courts of appeals on the question of the proper scope of a resentencing when the court of appeals gives no indication as to the intended scope of proceedings on remand. A number of courts of appeals have held that resentencing in such circumstances is presumptively limited in nature. See, *e.g.*, Pet. App. 6a n.2; *Santonelli*, 128 F.3d at 1237-1239; *Whren*, 111 F.3d at 958- 960; *United States* v. *Parker*, 101 F.3d 527, 528 (7th Cir. 1996); *Tamayo*, 80 F.3d at 1519-1520; *Stanley*, 54 F.3d at 107-108; *United States* v. *Bell*, 988 F.2d 247, 250 (1st Cir. 1993). Several other courts of appeals, however, have suggested that resentencing after remand is presumptively *de novo*. See, *e.g.*, *United States* v.

Smith, 116 F.3d 857, 859 (10th Cir.), cert. denied, 522 U.S. 903 (1997); *United States* v. *Jennings*, 83 F.3d 145, 151 (6th Cir.), cert. denied, 519 U.S. 975 (1996); *United States* v. *Ponce*, 51 F.3d 820, 826 (9th Cir. 1995).

The disagreement among the courts of appeals on that narrow procedural issue does not merit plenary review by this Court. Compare *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993) (noting that courts of appeals have supervisory authority to structure discretionary principles of appellate practice). A particular court of appeals may clarify its intent by adopting a rule that remand orders that give no specific indication of their intended scope should be generally construed to permit (or not to permit) *de novo* resentencing. But the fact that different circuits have different rules concerning the scope of remand in such cases poses no problem, since attorneys and district courts within each circuit can easily become familiar with local practice.

In any event, review is not warranted here for an additional reason. The district court ruled at the original sentencing that petitioner was responsible for the amount of drugs as recited in the Presentence Investigation Report, and petitioner did not contest that ruling in the first appeal. That issue was therefore abandoned. Petitioner argues (Pet. 6-8), however, that it was only after he was resentenced that he had reason and incentive to appeal the drug quantity calculations. The court of appeals correctly rejected that claim. As the court observed (Pet. App. 8a-9a), petitioner cannot claim that he believed that the issue was irrelevant at the time of his first sentencing, because he objected to the drug quantity findings at the district court level. And, because petitioner could not know which appellate argument he advanced would be successful, he was

obligated to appeal each contested issue that he wished to preserve. As the court below explained, the fact that "[petitioner] had another appealable issue which turned out to be successful * * * does not mean that the issue of drug quantity was not germane and appealable." Pet. App. 8a. Thus, at the time of petitioner's original appeal, it was plain to petitioner that if he was successful in his challenge to his life sentence under the three strikes provision, the drug quantity amount—which was decided adversely to him at the district court level—would be highly relevant. In those circumstances, the court of appeals properly concluded that because the drug quantity issue could have been raised in the original appeal, it was not proper for reconsideration by the district court at resentencing. See *United States* v. *Ticchiarelli*, 171 F.3d 24, 28 (1st Cir.) (suggesting negative answer to "the question whether a party, not having appealed from an aspect of explicit findings and conclusions at sentencing, is free on remand as to a different unrelated issue to require the court to hear that aspect again"), cert. denied, 120 S. Ct. 129 (1999); *Parker*, 101 F.3d at 528 ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal.").

The cases relied on by petitioner (Pet. 6-8) do not stand for the proposition that a district court must consider anew on remand an issue that was abandoned in a previous appeal. In *United States* v. *Ticchiarelli*, 171 F.3d at 30, *United States* v. *Jennings*, 83 F.3d at 151, and *United States* v. *Atehortva*, 69 F.3d 679, 684-685 (2d Cir. 1995), cert. denied, 517 U.S. 1249 (1996), a party was permitted to raise a new sentencing argument for the first time after remand, but the argument was irrelevant—and thus had not been raised—at the

time of the original sentencing. Here, by contrast, petitioner at the original sentencing actively contested the Presentence Investigation Report's computation of the quantity of drugs for which he was responsible, and the district court decided that issue adversely to him. Accordingly, in order to preserve the issue of drug quantity, petitioner was obligated to raise the issue on appeal. See *Whren*, 111 F.3d at 960 ("A defendant should not be held to have waived an issue if he did not have a reason to raise it at his original sentencing," but a defendant "may not revive in the second round an issue he allowed to die in the first.").

Indeed, it would seriously undermine the orderly and efficient operation of the appellate process if district courts were routinely required to reconsider issues that should have been challenged on appeal. See, *e.g.*, *Santonelli*, 128 F.3d at 1238 ("Repetitive hearings, followed by additional appeals, waste judicial resources and place additional burdens on parole officers and personnel and on hardworking district and appellate judges."); *Whren*, 111 F.3d at 960 (permitting parties to raise previously abandoned sentencing claims on remand would be "anomalous and inefficient"); *United States* v. *Connell*, 6 F.3d 27, 30 (1st Cir. 1993) (noting "wastefulness, delay, and overall wheel-spinning that attend piecemeal consideration of matters which might have been previously adjudicated" and stating that "litigants should not ordinarily be allowed to take serial bites at the appellate apple").*

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* Petitioner argues (Pet. 9-10) that a remand for resentencing under the Sentencing Guidelines necessitates a *de novo* hearing because the district court's factual findings under the Guidelines are frequently interdependent. Thus, he argues, quoting *United States* v. *Atehortva*, 69 F.3d at 685, "[w]hen a defendant challenges convictions on particular counts that are inextricably tied to other

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
JAMES K. ROBINSON
Assistant Attorney General
DEBORAH WATSON
Attorney

JUNE 2000

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counts in determining the sentencing range under the guidelines, the defendant assumes the risk of undoing the intricate knot of calculations should he succeed." We agree that when a defendant is found guilty on a multi-count indictment, the sentence imposed typically constitutes a package that takes into account "a breadth of information" to ensure that "the punishment will suit not merely the offense but the individual defendant." *United States* v. *Pimienta-Redondo*, 874 F.2d 9, 14 (1st Cir.) (en banc), cert. denied, 493 U.S. 890 (1989) (internal quotation marks omitted). Accordingly, "[w]hen the conviction on one or more of the component counts is vacated, common sense dictates that the judge should be free to review the efficacy of what remains in light of the original plan, and to reconstruct the sentencing architecture upon remand, within applicable constitutional and statutory limits, if that appears necessary to ensure that the punishment still fits both crime and criminal." *Ibid.* Those concerns, however, have no bearing on the instant case. The court of appeals did not reverse one count of a multi-count indictment. Rather, the court affirmed petitioner's conviction on the lone drug count with which petitioner was charged and vacated his life sentence because he was not eligible for a life sentence under the three strikes provision of 21 U.S.C. 841(b)(1)(A). That action by the court of appeals did not undo any intricate knot of district court sentencing calculations that would justify (let alone require) *de novo* sentencing on remand.